QUESTION PRESENTED FOR REVIEW

Whether Congress intended that an Indian tribal member be required to obtain a building permit from a town organized under state law but located on the Indian's reservation, where the Indian is occupying tribal land within the town under authority of tribal law.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

(1) Petitioner—Maurice John, an enrolled member of the Seneca Nation of Indians; and

(2) Respondents—(a) City of Salamanca, a municipal corporation organized under the laws of the State of New York; and (b) Norris Stone, a building code enforcement officer and employee of the Village.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

MAURICE JOHN,

Petitioner,

v.

CITY OF SALAMANCA and NORRIS STONE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet published; it is reprinted in the appendix to this Petition at p. 1a. The Order and opinion of the United States District Court for the Western District of New York, from which appeal was taken is also unpublished and is reprinted in the appendix at p. 13a.

JURISDICTION

The judgment of the Circuit Court sought to be reviewed was entered on April 19, 1988. This petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The statutory provisions involved in this case are: (1) Act of February 19, 1875, 18 Stat. 330; (2) Act of August 14, 1950, 64 Stat. 442; (3) 25 U.S.C. § 233, 64

Stat. 845; and (4) 28 U.S.C. § 1360, Pub. L. 280, 67 Stat. 589. These statutes are reprinted in the appendix at pp. 21a-30a.

STATEMENT OF THE CASE

This case concerns the application of the building code laws of the State of New York and of the City of Salamanca, New York, to lands "leased" by the Seneca Nation to Maurice John, an enrolled member of the Seneca Nation.[1] The Seneca Nation is a federally recognized and self-governing Indian tribe. The land is located in that portion of the village of Salamanca which falls within the Allegany Indian Reservation of the Seneca Nation.

1. The Seneca Nation

Maurice John is an enrolled member of the Seneca Nation. The Seneca Nation was one of the Six Nations of the Iroquois Confederacy. In 1848, the Senecas adopted a constitution which set up a tricameral government, including a legislature, a president and a judiciary. The judiciary consists of the Peacemaker's Court, which handles all disputes between Indians on the Reservation; and the Surrogate's Court, which is a court of limited jurisdiction handling probates. *See Patterson v. Council of Seneca Nation*, 157 N.E. 734, 737 (N.Y. 1927).

[1] John is the tenant of the Tribe with respect to this tribal land, having purchased the remainder of a long term lease from the previous tenant. According to tribal common law and custom, as well as City law, Petitioner John, as a member of the Tribe, has no obligation to pay rent. *See* Aff. of Norris Stone, Exh. D Record below ("Rec.") at 133; Salamanca Municipal Code § 174-a. His tenancy by tribal practice and custom is in the nature of an assignment, a practice frequently employed by Indian Tribes to vest possessory and occupancy interests in tribal land in tribal members. *See* Cohen, Handbook of Federal Indian Law 189 (1942 ed.). *See also Critzer v. United States*, 597 F.2d 708, 709-10 (Ct. Cl. 1979).

2. The Reservation and Jurisdiction

The present controversy occurred on the Allegany Reservation, which straddles the Allegheny River in southwestern New York, and encompasses approximately 42 square miles. *See People ex rel. Ray v. Martin*, 294 N.Y. 61, 60 N.E.2d 541, 543 (1945), *aff'd on other grounds*, 326 U.S. 496 (1946). It was part of a large tract of land reserved for the Seneca Nation by the treaty between the United States and the Six Nations in 1794, 7 Stat. 44, wherein the United States recognized the land as property of the Seneca Nation. 60 N.E.2d at 544. Only two tracts of that land now remain in Seneca ownership—the Allegany Reservation and the Cattaraugus Reservation. *See* Treaty of the Big Tree, 7 Stat. 601, Sept. 15, 1797, and the Treaty with the Seneca, 1842, 7 Stat. 586, which more definitely fixed the limits of the reservations.

When the Allegany Reservation was set aside it was not considered valuable by the whites, but with expansion westward, railroad companies sought to cross these lands. With the railroads came towns, including the village of Salamanca, which unofficially located itself partly on the Allegany Reservation. *See United States v. City of Salamanca*, 27 F. Supp. 541, 544 (W.D.N.Y. 1939). The reservation land underlying Salamanca was leased from the Tribe and individual Indians to the Railroads. Around 1870, a New York state court declared these leases void for lack of federal ratification. In response, the New York legislature petitioned Congress to remedy the situation by ratifying the leases. *See United States v. Forness*, 125 F.2d 928, 930-931 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942); H.R. Misc. Doc. No. 75, 43rd Cong., 2d Sess. (1875).

3. The 1875 Act

As a result, Congress passed the Act of February 19, 1875, 18 Stat. 330 (herein called the 1875 Act), App. at 21a, which provided for the ratification of the leases.

It further provided for the survey of the boundaries of the villages within the reservation to which the Act would apply. The Act provided for renewal of leases,[2] rental payments[3] and assignment. It also provided for jurisdiction in state or federal court over lease disputes.[4]

Finally, and this is the Section at issue here, Sec. 8 of the Act provided that,

> "Sec. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages [located within the Allegany and Cattaraugus Reservations], and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; *and all mu-*

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[2] Originally the leases were to expire after five years and were renewable for twelve. 18 Stat. 330, § 3, App. at 21a. In 1890, Congress extended the renewable term to 99 years. Act of Sept. 30, 1890, 26 Stat. 558.

[3] Sec. 6 provided "That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation." App. at 23a.

[4] Sec. 7 provided "That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions." App. at 23a.

This provision was added because New York courts had held they had no jurisdiction over such disputes and the white lessees did not want to have any lease disputes settled in tribal court. 3 Cong. Rec. 910, 918-919 (1875).

> *nicipal laws and regulations of said State may extend over and be in force within said villages*: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States." (Emphasis added.) 18 Stat. 331.

As the following discussion shows, the legislative history of the 1875 Act reveals that at the time of its passage, the village of Salamanca was occupied by white settlers only and that the Act was meant to ratify leases by the Indians of the Seneca Nation to these white settlers. There is no evidence that Congress intended that the Act subject the Indians to State or municipal laws, and indeed, the last proviso of the Act (disclaiming any intent to allow taxes on Indians) is evidence that Congress did *not* contemplate that Indians be subject to State or municipal laws.

In 1871, the legislature of New York sent its memorial to Congress which stated in part,

> "Whereas a portion of the Allegany Reservation, occupied by the Seneca Nation of Indians, has become populated by the white people; . . . and whereas it has become a matter of importance to the white settlers who have made improvements and invested their means in business pursuits thereon: Therefore,
>
> *Resolved, (if the senate concur,)* That the Senators from this State in Congress be instructed . . . to procure the passage of some act or the formation of a treaty with the Seneca Nation of Indians, whereby title may be obtained to the whole or a portion of the Allegany Reservation, or such relief secured for white settlers as the circumstances demand."

S. Misc. Doc. No. 44, 41st Cong., 3d Sess. (1871).

During the debate on House Bill No. 3080 (which became the 1875 Act), the discussion often focused on the

fact that Congress was being asked to confirm leases between Indians and white settlers and that the Senators understood white settlers occupied the village of Salamanca.

> Mr. INGALLS: "[T]hey [the Indians] entered into contracts with the railroad corporations and with the white settlers who now occupy these towns to the number of between three and four thousand . . . "

3 Cong. Rec. 908, 910 (1875).

> Mr. FENTON: "Hence these parties in interest, these white people who have settled upon or occupied some of these lands under leases from the Indians and paying them the amount agreed upon annually, come here and ask Congress to confirm these leases."

Id. at 911.

> Mr. BOGY: "These towns of course are occupied principally by white men . . . the Indians who formerly occupied these towns, and who were in possession of these lots as their homes, have sublet them . . . ."

Id. at 912.

> Mr. ALLISON: "[T]he only question now is whether the white people who have made contracts with these Indians . . . shall be deprived of their property and the improvements they have made in these towns or villages . . . ."

Id. at 913.

> Mr. THURMAN: "Mr. President, there are two sides to almost every question, and there are two sides to this. There are fifteen hundred or two thousand people in the village of Salamanca; a very nice, beautiful, thriving village on the Indian reservation called the Allegany reservation. There is property there to the value of millions. That property, or the value of that property, has been created with the assent of the Indians, by the labor and the capital

> of white men; and I do not suppose that any one here will ever be ready to allow the fifteen hundred white settlers of Salamanca to be turned out of their homes."

Id. at 915.

The debates also indicate that the boundaries of the subject villages (one of which was Salamanca) were to be limited to those lands occupied by white settlers.[5]

> Mr. FENTON: "There are no definite bounds to the villages; they are very compact. The authority is given to the commissioners to fix boundaries."
>
> Mr. MORRILL, of Maine:"They are necessarily limited by the improvements and occupation."
>
> Mr. FENTON: "I suppose they do not occupy in all over a thousand acres."

Id. Thus it is clear from the legislative history that Congress understood the village was occupied by white settlers and hence that the Act would only affect them.

4. The Forness Case

From the 1870s to 1940, the white lessees sought to have Congress grant them absolute title to the reservation lands, *see* S. Misc. Doc. No. 44, 41st Cong., 3d Sess. (1871) (quoted above). At the same time, many of them did not pay the prescribed rents, and were in default. The matter came to a head in 1942 when the United States on behalf of the Seneca Nation filed suit to cancel the leases of the defaulting lessees. The defaulting lessees then tendered the payments due and asserted that under New York state law this cancelled the defaults.

The United States argued that the general laws of the State of New York did not apply since Section 8 referred

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[5] Indeed, the final Act so reads. Section 2 provides that the boundaries of the village include "all lands now occupied by white settlers . . . ." App. at 21a.

to "municipal laws" of the State. The District Court agreed, holding:

> "It is contended that the words 'municipal laws' in section 8, supra, are used in contradiction to international laws. Such construction would extend the laws of the State of New York over all activities of this Nation of Indians within the villages named in the Act of 1875. *It seems clear when this is considered that the words 'municipal laws' were intended to apply only to the State laws for the government and control of villages.*"

United States v. Forness, 37 F.Supp. 337, 341 (W.D.N.Y. 1941), *rev'd on other grounds*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942) (emphasis added). That is, the general laws of the State did not apply in Salamanca, and therefore, the tender of arrears did not cancel the defaults.

The Second Circuit agreed, declaring that, absent Congressional consent, the general laws of the State of New York did not apply to the Allegany Reservation or the City of Salamanca. The court found that the 1875 Act did not constitute such consent. 125 F.2d at 932 and see detailed discussion below.

5. The 1950 Acts

In response to the *Forness* decision, the New York legislature petitioned Congress to clarify New York's jurisdiction over Indians,[6] and Congress passed two related acts—in 1948 covering criminal jurisdiction, 25 U.S.C. § 232 (not relevant here), and in 1950 covering civil jurisdiction, 25 U.S.C. § 233. App. at 27a. Second, because of the large number of lease defaults and also in response to *Forness*, Congress passed a third act, addressing the issue of ratification of Seneca leases and

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[6] H.R. Rep. No. 2355, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S. Code Cong. & Admin. News 2284, 2285.

payment for these leases. *See* Act of August 14, 1950, 64 Stat. 442. App. at 25a. This act we will call "the 1950 Leasing Act." The other 1950 act (relating to jurisdiction) we will call "the 1950 Civil Jurisdictional Act," or simply 25 U.S.C. § 233.

a. *The 1950 Leasing Act*

The 1950 Leasing Act provided that Salamanca could pay the rents on behalf of all lessees within the village directly to the Seneca Nation. The idea was to simplify the collection of the lease rents from the non-Indian lessees. The Act confirmed that the Tribe's rights in the leased lands were not being disturbed (Sec. 2); that Salamanca could not lease any lands without the consent of the Tribe (Sec. 1); and that the Tribe could lease land to non-Indians outside the village boundaries (Sec. 5). App. at 25a-26a.

The legislative history of the Act shows that Congress intended to preserve the rights of the Senecas in the leased lands. S. Rep. No. 2105, 81st Cong., 2d Sess. (1950), *reprinted in* 1950 U.S. Code Cong. & Admin. News 2978, 2979. It also makes clear that the City considered its jurisdiction over leased lands that were subject to foreclosure for nonpayment of rent "tenuous" at best. *Id.* In other words, the City recognized its jurisdiction was dependent on rental payments being made by the lessee because otherwise the Indians could foreclose and resume jurisdiction over the land. This Act granted the City the right to pay the yearly rent to the Senecas in a lump sum for all leased lands.

b. *The 1950 Civil Jurisdictional Act, 25 U.S.C. § 233*

One month after the passage of the 1950 Leasing Act, Congress passed 25 U.S.C. § 233, an act defining civil jurisdiction over Indians in the State of New York.

Section 233, a precurser to the soon-to-be-enacted Public Law 280,[7] states in part,

> "§ 233. Jurisdiction of New York State courts in civil actions
>
> "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . ."

App. at 27a.

The statute also provides that tribal common laws and customs may be given effect in court, that tribal members will not be subject to (1) fish and game license laws, (2) taxation of reservation lands, or (3) execution of judgment against such lands. In addition, it is provided that the Act shall not be construed to authorize alienation of reservation land and that New York civil laws and courts do not apply in any way to Indian land claims. *See* App. at 28a.

The legislative history of § 233 shows that it was passed at the request of New York, in response to the decision in the *Forness* case, holding that the State needed congressional consent in order for State laws to

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[7] Public Law 280, enacted in 1953, 67 Stat. 589, 18 U.S.C. § 1162, 28 U.S.C. § 1360, applied state criminal and civil law to Indian reservations in five states, similar to what 25 U.S.C. §§ 232 and 233 did in New York. App. at 29a. Today about a dozen states have substantial Public Law 280 jurisdiction. Cohen, Handbook of Federal Indian Law 362 n.125 (1982). As will be seen (pp. 20-25 below and n.19), the civil jurisdiction section of Public Law 280 does *not* extend State civil regulatory law to Indian reservations (such as the building code here involved). *Bryan v. Itasca County*, 426 U.S. 373 (1976).

apply to the leases to non-Indians on the Allegany Reservation. However, the history also shows that Congress did not give the broad grant of jurisdiction requested by New York.[8] Nor did Congress address the issue of the application of "municipal laws" in the village of Salamanca or on other reservations in the State.

The legislative history further indicates that Congress was giving a precise response to a defined problem. Congress pointed out that there was both a need for law and order on the Indian reservations in New York (hence Sec. 232), and a need to provide a forum for Indians to gain redress for civil wrongs, hence Sec. 233. H.R. Rep. No. 2355, 80th Cong., 2d Sess. (1948) *reprinted in* 1948 U.S. Code Cong. & Admin. News 2284. H.R. Rep. No. 2720, 81st Cong., 2d Sess. (1950) *reprinted in* 1950 U.S. Code Cong. & Admin. News 3731, 3732.

As we explain below, we believe it is clear that the 1950 Jurisdiction Act has superseded the 1875 Act, and that any civil jurisdiction Salamanca may have had over Indians within its limits on the Reservation, if any, was limited after 1950 to the consent given in Sec. 233. Consequently, Petitioner had no obligation to obtain a Salamanca building or sign permit.

6. Application of the Local Regulations

It is within the context of this history that the City of Salamanca attempted to apply its building code licensing requirements to Petitioner Maurice John.

Mr. John owns a restaurant on reservation lands within the City of Salamanca. He is a tenant of the Tribe under

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[8] Congress limited the State's jurisdiction to "the courts" of New York, making even clearer than in Public Law 280 that Congress was not extending State regulatory laws to the reservations. See note 7 above. It is notable that the reference to "courts" does not appear in the criminal provision, 25 U.S.C. § 232. Hence, § 232 is broader in scope than § 233, which is also true of the comparable sections of Public Law 280.

a long-term lease which he purchased from the previous tenant. *See* note 1 above. In 1986, John began renovation of the restaurant, but did not first apply for a building permit, nor did he file his plans with Salamanca's zoning commissioner, Respondent Norris Stone. This would violate Salamanca Municipal Ordinance § 26, if applicable. Rec. below at 14. In addition, Petitioner John erected a sign on the premises without first obtaining a sign permit pursuant to § 30.62 of the City's Municipal Code. In all, Petitioner has been served with three orders to remedy these violations under pain of penalties for failure to comply.[9]

7. Proceedings Below

On June 27, 1986, Petitioner John filed a complaint in the U.S. District Court for the Western District of New York against the City of Salamanca and Norris Stone, requesting the defendants be enjoined from enforcing the above-described civil ordinances on Seneca Nation members within the reservation and particularly on John. He contended the defendants had no authority to enforce the ordinances against him.

The defendants argued that the 1950 Jurisdiction Act, 25 U.S.C. § 233, made the City's building regulations applicable to Petitioner. The District Court agreed with the defendants, holding that 25 U.S.C. § 233 gave the City of Salamanca the power to enforce state laws against Petitioner John, since § 233 gave New York "general jurisdiction over Indian reservations." Order at 8, App. at 19a.

John appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed, not on the basis of 25

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[9] On April 22, 1986, Petitioner received an "Order to Remedy Violation" for failure to file for a building permit with plans and specifications. On June 20, 1986, another order concerning failure to obtain a building permit was issued. On July 7, 1986, Petitioner received an order requesting compliance with the sign permit ordinance. Rec. below at 11-12, 28.

U.S.C. § 233, *but on the basis of the 1875 Act alone.* The court held that the 1875 Act authorized the enforcement of the village's municipal laws against Indians on the Allegany Reservation. The court did not reach the issue of whether 25 U.S.C. § 233 gave New York general regulatory jurisdiction over Indians on the Allegany Reservation.

REASONS FOR GRANTING THE WRIT

As this case presently stands, New York's civil jurisdiction over Indians on Indian reservations is in a state of thorough confusion. The District Court held that under 25 U.S.C. § 233 New York has general civil regulatory jurisdiction over such Indians, which means that New York's jurisdiction is inconsistent with that of the dozen or so states under Public Law 280, even though Public Law 280 and 25 U.S.C. § 233 are so similar in language and purpose that inconsistent readings cannot be sensibly defended.

The Court of Appeals seemed to have doubts about the District Court's ruling, as well it should, but instead of correcting it, it chose to rule against Petitioner on another ground. The District Court's ruling thus remains in full force, and thus state civil jurisdiction on every Indian reservation in New York must, unless this Court acts in this case, remain in doubt until this Court has a subsequent opportunity to resolve the matter. It is inevitable that in future civil litigation on this Reservation, one party or the other will feel duty-bound to raise the jurisdiction issue until it has been resolved by this Court.

Moreover, the expedient skirting of the § 233 issue by the Court of Appeals has given new life to the 1875 Act, an Act whose jurisdictional grant did not apply to Indians on lands leased to them by the Tribe and, if it ever meant the State or local authorities had civil regulatory jurisdiction over Indians on the reservation, has been implicitly superseded by § 233, which does *not* confer such jurisdiction. In *New York ex rel. Ray v. Mar-*

tin, 326 U.S. 496 (1946) this Court reserved judgment on the scope and validity of the 1875 Act. 326 U.S. at 499 n.3. In light of the ruling of the court below, the issue will now be arising regularly, until this Court resolves it.

In order to preserve the sovereignty of the Seneca Nation, which Congress never intended to compromise, and in order to clear up confusion throughout New York as to state jurisdiction on Indian reservations, this Court should grant certiorari and reverse.

I. The 1875 Act Did Not Grant Regulatory Jurisdiction to the State Over Indians

The Second Circuit below (but not the District Court) held that the 1875 Act granted regulatory jurisdiction to the City of Salamanca over all leasehold interests within the town, even those held by Indians. The court further held that the 1875 Act limited the Seneca Nation's sovereignty within the town, even as to those lands held by Indians.[10]

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[10] The Second Circuit held that under the 1875 Act the Tribe's sovereignty was extinguished within the village boundaries completely, and that the Tribe had no powers over the lands "regardless of the identity of the possessor." App. at 11a-12a. Thus, not only did the court permit broad jurisdiction by local authorities, the court trammeled any shred of tribal power within the City by giving it to local authorities. The court has turned the Tribe into a "private, voluntary organization." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The fact of the matter is that currently the Tribe is unable to exercise its power within the City since no one in the City recognizes the Tribe's power. The Tribe has passed ordinances concerning taxes which are pointedly ignored by the City residents. The Second Circuit ruling reaffirms the blatant disregard for the Tribe's power. Moreover, the City is watching this case closely with an eye to stepping in and regulating the bingo operations run by the Seneca Nation. *See, e.g.*, Mass, *City Officials Close Door on Seneca Bingo Talks*, Olean Times Herald, May 12, 1988. If certiorari is denied, the Tribe's right to run bingo under *California v. Cabazon Band of Mission Indians*, —— U.S. ——, 107 S.Ct. 1083 (1987), may well be the next tribal right to be abrogated.

We would agree with respect to non-Indian tenants, but when the non-Indian leasehold is vacated and an *Indian* becomes the tenant under the Tribe, then we contend that the jurisdiction granted under the 1875 Act becomes inapplicable, and the tribal sovereignty resumes.[11]

When Congress passed the 1875 Act, Salamanca was exclusively white. Congress was aware of this, as the legislative history above indicates. At the time of the 1875 Act, no Indians were in possession of leased lands. The village boundaries were to be fixed by reference to lands occupied by white settlers and the record below indicates that no Indians occupied lands within the survey.

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[11] The Second Circuit refused to recognize any distinction between the assertion of jurisdiction over leased lands occupied by non-Indians under the 1875 Act, and leased lands vacated by whites and held by tribal members. The fact of the matter is that the City routinely treats lands leased to Indians differently from lands leased by whites.

At the District Court level, Respondent Norris Stone, by way of affidavit, affirmed that historically Salamanca was not occupied by Indians. Recently, however, Indians have begun occupying leased lands in the City. According to Respondent Stone, some 130 Indians now occupy leased lands. Rec. below at 133, 139-141.

When an Indian takes possession of leased land within the City, the land is placed on an exemption list of the tax and assessment (rent payment) rolls of the City. *See* Aff. of Stone, Exh. D, *id.* That is, by Indian occupancy of the leased land, the status of the land changes so that the Indian pays no taxes to the City, and according to tribal common law and custom and municipal ordinance, pays no rent to the Tribe. *See* City of Salamanca Municipal Code § 174-a. Thus, with Indian occupancy, the status of the land changes from "leased lands" within the meaning of the 1875 Act, to Indian land held under tribal common law and custom.

The City has recognized the importance of the lease and rental payments in maintaining their jurisdiction over the land. *See* legislative history of the 1950 Leasing Act described above, p. 9. It therefore recognizes that when the lands are no longer held by a rent-paying non-Indian, the nature of the City's jurisdiction changes.

See Aff. of Norris Stone. Rec. at 133.[12] Clearly, the Act was directed to lands leased by Indians to whites, and hence jurisdiction under Section 8 was addressed to non-Indians. See Legislative History above at pp. 3-7.

Even in later years, many judicial opinions have recognized the fact that Salamanca was inhabited by few, if any, Indians. In *Benson v. United States*, 44 F. 178 (C.C.N.D.N.Y. 1890), the federal Circuit Court for New York addressed the issue of whether Salamanca constituted "Indian country" within the meaning of the Indian Country Crimes Act and held it was not Indian country. The court stated,

> "In the progress of the general development of the country, settlements of whites grew upon this reservation, acquired names and coherency, and became flourishing communities. The Indians leased their lands within the boundaries of these settlements, and moved their domiciles elsewhere. Corporations obtained leases from the Indians, and built railroads through the reservation. Gradually the line of demarkation between the areas upon the reservation occupied by the whites and by the Indians became distinctly defined. At the time of the trial, the only resident Indians in Salamanca were two women, each of whom was married to a white man; and all the lands within the village limits were in the occupation of white men, under Indian leases."

44 F. at 179.

In *People ex rel. Ray v. Martin*, 60 N.E.2d 541 (N.Y. 1945), *aff'd on other grounds*, 326 U.S. 496 (1946), the court, also addressing the same issue of whether Salamanca constituted Indian country, stated,

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[12] The question of the boundary is significant to the issue of local jurisdiction over Indians since it would imply that, as the village grew over the reservation, then by fiat, the jurisdiction of local authorities would also expand over the reservation. Congress could not have intended an unchecked expansion of jurisdiction over Indians on the reservation.

> "We may doubt whether the phrase 'Indian country' . . . could, in any event, be reasonably applied to Salamanca, in which live only a handful of Indians and which is, by State statute and Act of Congress (as we shall see hereafter) *a white man's city.* Only by main force, we think, could the term be applied to a city all of the lands of which have, by corporate action of the Seneca Nation and with the express consent of Congress (see later discussion of the Act of 1875) been leased to white persons."

60 N.E. 2d at 546 (emphasis added). The Court held it was not Indian country.[13]

The N.Y. court also spoke to the 1875 Act stating,

> "The Act of 1875 was an act of cession in the sense that it ceded to the State such governmental jurisdiction as the National government or the Seneca Nation might otherwise have or been thought to have, *over the white villages.*"

60 N.E. 2d at 548 (emphasis added).

While we disagree with the New York court's broad reading of the 1875 Act in *Martin*,[14] the point is that both Congress and prior court opinions recognized that at the time of the passage of the Act and until recent times, Indians did not occupy the leased lands.

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[13] Both *Benson* and *Martin* are undoubtedly wrong in their holding that Salamanca is not "Indian country." The town is admittedly located on an Indian reservation, which is Indian country by statutory definition, even portions patented to non-Indians. 18 U.S.C. § 1151 (Indian country includes all land within an Indian reservation, "notwithstanding the issuance of any patent . . ."). *See*, generally, *United States v. Sandoval*, 231 U.S. 28 (1913); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982).

[14] When *Martin* came before this Court, the State urged the Court to affirm the State's assertion of broad jurisdiction under the 1875 Act. This Court declined to address the issue. *See Martin*, 326 U.S. at 498 n.3.

It is axiomatic that Congressional intent to grant state or local jurisdiction over Indians must be express and clear. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-171 (1973). Because Congress was dealing with a piece of the Reservation exclusively occupied by white tenants, it never addressed the issue of tribal sovereignty over Indians who might in the future come to live in the village. Thus it is clear that the requisite clarity of Congressional intent to shift sovereignty over Indians from the Tribe to the State is lacking.[15]

II. Even if the 1875 Act Did Grant Regulatory Jurisdiction Over Indians, It Was Superseded by § 233

Assuming *arguendo* that the 1875 Act granted jurisdiction to the City of Salamanca to enforce its laws against Indians within the village of Salamanca, this Court's precedents require the conclusion that the 1875 Act has been implicitly superseded by the 1950 Jurisdiction Act, 25 U.S.C. § 233. The Second Circuit has erred in ignoring the effect § 233 had on the 1875 Act.

The Second Circuit did not address and was presumably oblivious to the *Blackfeet* case. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), this Court addressed the issue of State jurisdiction to tax royalty interests in mineral leases on Indian lands. There were two congressional Acts in question there, a 1924 Act which ex-

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[15] The Second Circuit relied on the fact that Section 8 of the 1875 Act expressly exempted Indians and Indian property from taxation. Because of this express exemption Congress must have, said the court, expected Indians to be living within the village, thus Congress intended to subject them to all municipal laws except taxes.

This does not follow at all. If anything, it represents a disclaimer by Congress that it was in any way intending to allow the state to tax the absentee interests of the Indian landlords. Further, this Court rejected the same argument presented in *Bryan v. Itasca County*, 426 U.S. 373, 378-379 (1976).

pressly permitted state taxation of the royalties, and a 1938 Act which was silent as to taxation.

This Court noted the basic rule that a State has no jurisdiction to tax Indians without clear Congressional consent, and held that the 1938 Act contained no such consent. 471 U.S. at 766. It also held that there was no indication of any congressional intention to incorporate the 1924 Act's taxing provision by implication. 471 U.S. at 767.

This Court concluded that Congress failed to reaffirm the 1924 Act grant of jurisdiction expressly in the 1938 Act. 471 U.S. at 764, 766. Given the Indian canon of construction, this was enough to lead the Court to the conclusion that consent to tax Indians had been withdrawn prospectively. 471 U.S. at 767.

So here. Let us assume *arguendo* that the 1875 Act did give local regulatory jurisdiction to the town over Indians on the Allegany Reservation. Even so, the passage of the 1950 Jurisdiction Act (25 U.S.C. § 233), affirmatively defining State and local jurisdiction in a way that excluded State and local *regulatory* jurisdiction over Indians (as we show in the next section), implicitly withdrew Congress' consent, supposedly conferred by the 1875 Act, to the exercise of local regulatory jurisdiction over Indians.[16] Under the *Blackfeet* case and the Indian canon of construction, Congress had to *reenact* the broad jurisdiction set forth in the 1875 law in order to include its provisions in the revised jurisdiction plan enacted as 25 U.S.C. § 233.[17] This it did not do, and as a conse-

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[16] It must be remembered that section 233 was passed in specific response to judicial interpretation of jurisdiction under the 1875 Act in the *Forness* case. See discussion above at pp. 8-11.

[17] It could be argued that like the conclusion in *Blackfeet*, where the Court held that both the 1924 Leasing Act and the 1938 Leasing Act remained in force with different jurisdictional schemes, the City of Salamanca continues to have jurisdiction over Indians oc-

quence, in 1950 the scope of the 1875 Act, if it was ever broader than the 1950 Act's scope, was reduced to the more limited scope allowed by the 1950 Act, and that means that Salamanca had no regulatory jurisdiction over Petitioner.

III. Congress Did Not Intend to Grant Civil Regulatory Jurisdiction to New York Under 25 U.S.C. § 233

If this Court agrees that the 1875 Act was not intended to apply to Indians (Sec. I above), or if it did, that the 1875 Act was superseded by the 1950 Jurisdiction Act (Sec. II above), then the scope of the latter (§ 233) becomes the key issue. We contend that § 233 does not extend State civil regulatory jurisdiction to the Reservation.

The District Court below held, and the Court of Appeals let stand without discussion, that 25 U.S.C. § 233 was a grant of general civil jurisdiction over Indians to the State of New York, and therefore the enforcement of the zoning regulation was a legitimate exercise of state jurisdiction.[18]

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cupying 1875 Act leases, but no jurisdiction over Indians occupying leases made after 1950.

But this case is quite different from *Blackfeet* in that respect. In *Blackfeet*, the later Act was *silent* as to taxes, and this Court was unwilling to find that this silence *repealed* the earlier Act with respect to preexisting leases (it found this so only as to prospective leases). In the instant case, on the other hand, the later Act *affirmatively establishes* a jurisdictional scheme, and therefore has a strong preemptive effect on the old Act that mere silence would not have had.

[18] At the District Court, the City of Salamanca argued it was charged with the enforcement of the general laws of the State of New York such as the building code, New York State Uniform Fire Prevention and Building Code Act, Article 18-A, Executive Law § 370. The District Court held that § 233 permitted enforcement of the code as a *state* law. App. at 17a-19a.

The Second Circuit held that the building code and enforcement mechanism ordinances were municipal, not state laws. App. at 8a. Because the Second Circuit interpreted *Forness* as holding that only

The holding that § 233 is a grant of general civil jurisdiction has expanded New York's jurisdiction over Indians far beyond what Congress apparently intended in 1950, and certainly far beyond what Congressional policy today would permit. Indeed, the language of § 233 is even more restrictive than its kin, Public Law 280.[19] Under the reasoning of *Bryan v. Itasca County*, 426 U.S. 373 (1976), which construed Public Law 280, it is clear that New York's jurisdiction is limited to civil causes of action, and that its regulatory writ does not run on the Seneca Reservation. A comparison of 25 U.S.C. § 233 and Public Law 280 reveals a striking similarity in the statutes. The Acts were passed in 1950 and 1954, respectively, and should be considered *in pari materia*. *Menominee Tribe v. United States*, 391 U.S. 404, 411 (1968). Each statute grants jurisdiction as follows:

25 U.S.C. § 233	*Public Law 280*
"*The courts of the State* of New York under the laws of such State *shall have jurisdiction in civil actions* and proceedings between Indians or between one or more Indians and any other person or persons *to the same extent as the courts of the State shall have jurisdiction in other*	"[28 U.S.C. § 1360(a)] *Each of the States* or Territories listed . . . *shall have jurisdiction over civil causes of action* between Indians or to which Indians are parties which arise in the areas of Indian country . . . *to the same extent that such State or Territory has jurisdic-*

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municipal laws—not state laws—apply under the 1875 Act, it *had* to find the building laws were municipal laws, or else reverse.

We believe the law can be considered either a state or municipal law, though it appears to be a model state law adopted by the City as a municipal law. The precise definition of the type of law it is is irrelevant to our argument.

[19] See note 7 above. Public Law 280, enacted in 1953, was a general statute giving several states full criminal jurisdiction over Indian reservations, and extended state civil laws (but not regulatory laws) to the reservations. Other states were invited to accept this jurisdiction over Indian reservations, and some did. New York did not, as it already had equivalent jurisdiction under 25 U.S.C. §§ 232 and 233.

civil actions and proceedings, as now or hereafter defined by the laws of such State . . . ."

App. at 27a.

tion over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory . . . ."

App. at 29a.

While § 233 grants jurisdiction only to *the courts* of New York, Public Law 280 grants jurisdiction to the State for civil causes of action *and* makes civil laws of general application applicable in Indian Country.[20] This latter proviso does not appear in § 233, and the grant of jurisdiction under § 233 is thus narrower.

Both Acts also contain similar provisos specifically addressing certain aspects of laws that are not to apply to Indians.[21]

25 U.S.C. § 233

"Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain *fish and game licenses from the State of New York for the exercise of any hunting and fish-*

Public Law 280

"[18 U.S.C. § 1162(b)] Nothing in this section . . . shall deprive any Indian or any Indian tribe . . . of any right . . . *afforded under Federal treaty, agreement or statute, with respect to hunting, trapping, or*

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[20] It was suggested that the term "the courts" be deleted from both 25 U.S.C. § 232 and § 233, so jurisdiction would not be limited to the courts. *See* Report of the Secretary of the Interior, March 1, 1948, H.R. Rep. No. 2355, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S. Code Cong. & Admin. News 2284, 2287. However, the deletion was made only with respect to § 232, the criminal section.

[21] The State contended below that because § 233 enumerated specific exceptions to New York's jurisdiction, these exceptions were the *only* laws not applicable to Indians in New York. This contention ignores the settled canon of construction that ambiguities in statutes be construed in favor of Indians. It also flies in the face of this Court's decision rejecting this position under Pub. L. 280. *See, e.g., Bryan*, 426 U.S. at 390.

ing rights provided for such Indians under any agreement, treaty, or custom:

"Provided further, That nothing herein contained shall be construed as *subjecting the lands within any Indian reservation* in the State of New York *to taxation* for State or local purposes . . . And provided further, That nothing herein contained shall be construed as authorizing *the alienation* from any Indian nation, tribe, or band of Indians *of any lands* within any Indian reservation in the State of New York . . . ."

App. at 28a.

fishing or the control, licensing, or regulation thereof."

"[28 U.S.C. § 1360(b)] Nothing in this section shall authorize *the alienation, encumbrance, or taxation of any real or personal property*, including water rights, *belonging to any Indian or any Indian tribe*, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or *shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute* or with any regulation made pursuant thereto . . . ."

App. at 29a-30a.

Both statutes protect hunting and fishing rights, treaty rights, and prevent taxation of property, alienation of lands or encumbrances thereon.

Finally, both Acts sought to preserve tribal customs and laws.

25 U.S.C. § 233

"*Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, *those tribal laws and customs* which they desire to preserve . . . ."

App. at 28a.

Public Law 280

"[28 U.S.C. § 1360(c)] Any *tribal ordinance or custom* heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

App. at 30a.

These statutes are so similar it cannot be seriously argued that § 233 should not be interpreted like Public Law 280.[22] This Court's decision and analysis in *Bryan* applies squarely. Even the legislative histories of the statutes are similar.

In *Bryan*, this Court observed that Public Law 280 was passed to address lawlessness on reservations and to provide forums for the resolution of private disputes between reservation Indians. *Bryan*, 426 U.S. at 383. The legislative history of §§ 232 and 233 reflect the same concerns. *See* above at 9-11.

The title of § 233 defines the scope of the statute as "§ 233. Jurisdiction of New York State *courts* in civil actions" (emphasis added). This same factor, that the title of P.L. 280 described causes of action and appeared to address only the judiciary, was noted in *Bryan*, 426 U.S. at 384 n.11, as evidence that P.L. 280 did not grant general regulatory jurisdiction. The express reservation of tribal customs and laws and their applicability in "causes of action" was also considered a factor in Congress' intent to limit the State's jurisdiction under P.L. 280. Under § 233, tribal common laws and customs are also preserved for application in the courts. *Id.*

Bryan also compared P.L. 280 to other termination statutes and concluded that the legislative history did not show an intent to effect total assimilation. *Bryan*, 426 at 387-388. A similar analysis of § 233 also shows no such intent to achieve total assimilation or termination. When regarded in light of other termination statutes passed during the same time period, *id.*, it is clear that when Congress intended to effect assimilation or termination it knew how to do so, but did not in § 233.

In fact, where the application of state and local zoning ordinances is in issue (as in the instant case), the appli-

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[22] A comparison between P.L. 280 and § 233 has been made. *See* Cohen, Handbook of Federal Indian Law, 372-373 (1982 ed.).

cation of these laws has been expressly rejected under Public Law 280 as contrary to modern congressional policy and because of the destructive effect it would have on tribal self-government and economic development.[23] *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 662-663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), *cited with approval in Bryan*, 426 U.S. at 388-389 n.14 (concerning application of zoning regulations to Indian lands). *See also Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390 (9th Cir. 1987) (application of local rent control regulations not permitted under Public Law 280).[24]

It has also been held that the application of zoning regulations constitutes an encumbrance and hence is not permitted under P.L. 280. *See Santa Rosa*, 532 F.2d at 667; *Snohomish Co. v. Seattle Disposal Co.*, 425 P.2d 22,

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[23] In the proceedings below the City argued that historically, they and the State have exercised general civil jurisdiction over these Indians and that § 233 was an expression or reaffirmation of that exercise of authority. App. at 4a. The Second Circuit apparently believed that the fact that these laws had been followed previously was significant. *Id.*

However, even if historically New York has exercised such jurisdiction, the language of § 233 does not permit such broad authority and the fact that a state believes it has jurisdiction is not enough to create it. *See Mattz v. Arnett*, 412 U.S. 481 (1973) (where the state historically acted as if it had jurisdiction, but it did not, since the reservation was never terminated). Indeed, absent congressional consent, even an attempt by a *tribe* to vest a state with jurisdiction over the reservation is ineffective. *Kennerly v. District Court*, 400 U.S. 423 (1971). Moreover, current congressional policy is relevant and the past assimilationist policy has been discarded in favor of tribal self-determination. *See Moe v. Salish & Kootenai Tribe*, 425 U.S. 463, 479 (1976) (where the court held that current congressional policy is relevant to interpretation of previous legislation).

[24] In *Segundo*, where local authorities attempted to enforce local rent control ordinances, the Court pointed out that the fact that a tribe has not legislated in a particular area does not mean it has relinquished its authority to do so. 813 F.2d at 1393.

26 (Wash.), *cert. denied*, 389 U.S. 1016 (1967). Such reasoning applies with full force to § 233.[25]

If this Court interprets § 233 similarly to Public Law 280, then § 233 does not permit the application to the Petitioner of civil regulatory laws like the zoning laws and municipal ordinances in issue here.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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HANS WALKER, JR.
MARSHA KOSTURA

July 15, 1988

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[25] It is also clear § 233 does not permit application of local laws. First, the laws are clearly regulatory and so under the *Bryan* analysis may not apply. Second, as pointed out in *Santa Rosa*, *supra*, permitting local regulation to apply to Indian reservations renders the Tribe's powers meaningless. That is, if tribal common laws are preempted by local regulation, there is nothing left for the tribe to do in its exercise of sovereignty. 532 F.2d at 662. Such is the case in Salamanca where those local laws the Tribe has passed are ignored and unenforceable. See note 10 above.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 203—August Term, 1987

(Argued November 2, 1987 Decided April 19, 1988)

Docket No. 87-7404

MAURICE JOHN, a Native American and member of the Seneca Nation of Indians,
Plaintiff-Appellant,

—against—

CITY OF SALAMANCA and NORRIS STONE,
Defendants-Appellees.

Before: PIERCE, WINTER and MINER, *Circuit Judges.*

Appeal from a summary judgment in favor of appellees entered in the United States District Court for the Western District of New York (Curtin, Ch. J.) dismissing appellant's challenge to enforcement of city ordinances on property located within the Allegany reservation of the Seneca Indian Nation.

Affirmed.

ROBERT L. PIRTLE, Seattle, WA (Kenneth W. Dehn, Pirtle, Morisset, Schlosser & Ayer, Seattle, WA; Timothy O'Mara, Thomas J. Ryan, Jr., Williams, Stevens,

McCarville & Frizzell, Buffalo, NY, of counsel) *for Plaintiff-Appellant.*

R. WILLIAM STEPHENS, Buffalo, NY (Raichle, Banning, Weiss & Stephens, Buffalo, NY; David M. Franz, Shane & Franz, Olean, NY, of counsel) *for Defendants-Appellees.*

William W. Taylor, III, Leslie A. Blackmon, Zuckerman, Spaeder, Goldstein, Taylor & Kolker, Washington, DC, filed a brief for *Amicus Curiae The Oneida Nation of Indians.*

Douglas B.L. Endreson, Reid Peyton Chambers, Sonosky, Chambers & Sachse, Washington, DC, filed a brief *for Amicus Curiae The Seneca Nation of Indians.*

MINER, *Circuit Judge*:

Plaintiff-appellant Maurice John appeals from a summary judgment entered in the United States District Court for the Western District of New York (Curtin, Ch. J.) in favor of defendants-appellees Norris Stone and the City of Salamanca. John, an enrolled member of the Seneca Nation of Indians, claims that, because his commercial property is located on Seneca Nation land, the City of Salamanca and its zoning code enforcement officer, Norris Stone, are without authority to compel John's compliance with the city's building code. We agree with the district court that federal law subjects John's property to regulation and affirm the grant of summary judgment.

BACKGROUND

Maurice John is an enrolled member of the Seneca Nation of Indians. He owns a restaurant bearing his name in Salamanca, New York. According to the appellees, eighty-five percent of the City of Salamanca, including the site of John's establishment, lies within the Allegany reservation. This reservation land was set aside

for the Seneca Nation by the United States government in the Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44 (the "1794 Treaty"). Through various agreements negotiated in the latter half of the nineteenth century, the Seneca Indians leased reservation land to settlers and rail companies. *See United States v. Forness*, 125 F.2d 928, 930-31 (2d Cir.), *cert. denied, sub nom. City of Salamanca v. United States*, 316 U.S. 694 (1942). These leases subsequently were ratified by Congress, and villages that had been established unofficially on the leased land were recognized. *See* Act of Feb. 19, 1875, ch. 90, 18 Stat. 330 (the "1875 Act"). The villages of Salamanca and West Salamanca, which merged to become the City of Salamanca in 1913, were among the villages recognized in the 1875 Act.

In 1986, John began renovating his restaurant premises without first applying for a building permit and filing his plans with Salamanca's zoning commissioner, appellee Stone, in violation of Salamanca Municipal Ordinance § 26.31. As a consequence, appellant was served with notices of violation and stop orders, the last of which was served on June 27, 1986.[1] Following the commencement of this action, John applied for a temporary restraining order and preliminary injunction, alleging that the defendants were without authority to enforce the building code against him and that their attempts to enforce it constituted harassment. In his complaint, he requested damages and permanent injunctive relief.

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[1] On July 7, 1986, after the complaint in this action was filed, John was served with an "Order to Remedy Violation" for his failure to comply with Salamanca Municipal Ordinance § 30.62 in connection with the installation of a sign on the facade of his premises. Section 30.62 regulates the erection of exterior signs on buildings within the city, and requires a sign permit before erection can commence. Salamanca Mun. Ord. § 30.62. John also challenges enforcement of this provision of the Salamanca building code.

Appellees opposed John's motion and moved for summary judgment, supported by the affidavits of Stone, numerous city officials and others attesting to the past compliance with the city's building code by members of the Seneca Nation. Additionally, appellees contended that the city's enforcement of its building code was authorized by federal law. In particular, they claimed that Congress expressly granted the State of New York jurisdiction over the Seneca Nation in the 1875 Act and in 25 U.S.C. § 233,[2] which extended the civil jurisdiction of the state courts over the Seneca Indians.

In opposition to the motion for summary judgment, John submitted his own affidavit, arguing that the Seneca Nation owned the Allegany reservation and that the city's attempt to enforce its ordinances was an unauthorized infringement of the Seneca Nation's sovereignty. John presented no evidence to rebut the city's factual submissions concerning past compliance with the building code, although he did claim that the affidavits offered were "self-serving."

Chief Judge Curtin granted the motion for summary judgment. He held that section 233 was an explicit grant to New York State of civil jurisdiction over the Seneca Indians. Since the Salamanca building code was enacted pursuant to authority delegated by the state, *see* N.Y. Exec. Law § 374-a (McKinney 1982), the Judge concluded that the code had the effect of state law. Thus,

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[2] Section 233 provides in pertinent part:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . .

25 U.S.C. § 233 (1982).

as a matter of law, John was subject to the code pursuant to section 233.

On appeal, John attacks the district court's decision on several grounds. He argues that the city's ordinances are preempted by the 1794 Treaty, which guarantees the Seneca Indians "free use and enjoyment" of the reservation lands, *see* 1794 Treaty at art. III. He also bottoms his challenge on the principle that, absent congressional action conferring regulatory power, state and local governments are without authority to enforce zoning and building codes on Indian reservations. *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). John claims that section 233 is not, as the district court found, such a grant of authority.

John asserts that federal law places the power to oversee the Allegany reservation in the Secretary of the Interior and that the Secretary's regulation, 25 C.F.R. § 1.4 (1987), explicitly prohibits enforcement of state and local zoning and use restrictions on the reservation. He argues that enforcement of the city's code is an affront to the sovereignty of the Seneca Nation. Finally, he disputes the contention, urged by appellees, that the 1875 Act extends municipal law to the leased land.

We conclude that the 1875 Act, as interpreted by this Court in *Forness*, controls the instant dispute.

DISCUSSION

The Supreme Court has recognized that Indian "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980); *see also* Note, *Tribal Sovereign Immunity: Searching For Sensible Limits*, 88 Colum. L. Rev. 173, 178 (1988) (under the Constitution, Congress has plenary authority over Indians). Nevertheless, a state may apply its law to

Indians living on reservations within its borders "if Congress has expressly so provided." *California v. Cabazon Band of Indians*, 107 S. Ct. 1083, 1087 (1987). We must determine whether the 1875 Act is such an express congressional grant of regulatory authority.

The 1875 Act formally recognizes those villages that already were established on the leased Allegany reservation land and extends the reach of "municipal laws" to those villages. *Forness*, 125 F.2d at 932. Section 8 of the 1875 Act provides:

> That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless*, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

18 Stat. at 331 (emphasis in original). In *Forness*, this court held that the words "'[m]unicipal laws' of such a state can have but one referent, i.e., the laws of [New York State's] municipalities." *Forness*, 125 F.2d at 932. We find that section 8, as interpreted in *Forness*, expresses Congress' intention to extend ordinances, such as those Salamanca wishes to enforce against John, to the leased land.

At the outset, we address John's contention that the ordinances are state, not municipal, laws. John asserts that the ordinances simply enforce state law regulating building standards, and that this alters the local nature of the city's enactments. The City of Salamanca, like many of New York's municipalities, has elected to adopt

and enforce the state's building code within its territorial limits. *See* N.Y. Exec. Law § 374-a (McKinney 1982). However, under this scheme, the municipality functions as more than a mere conduit for state regulation. Enforcement of the state building code is the municipality's responsibility, and all laws concerning "approval or disapproval of plans and specifications" and "the issuance and revocation of building permits" are to be adopted at the local level. N.Y. Exec. Law § 383.[3] The Salamanca municipal ordinances at issue are part of this enforcement mechanism. We conclude, therefore, that the ordinances are municipal—not state—laws.

Of course, identifying the ordinances as "municipal laws" cannot resolve fully the instant dispute, for the parties disagree on the definition of those words as Congress used them in section 8. John urges us to adopt the view of the district court in *Forness* that "the words 'municipal laws' were intended to apply only to the State laws for the government and control of villages," *United States v. Forness*, 37 F. Supp. 337, 341 (W.D.N.Y. 1941). We decline to accept this construction, since it plainly is inconsistent with our own observation in *Forness* that the word "municipal" has the same meaning "as when we speak of the 'Municipal Building' of the City of New York." 125 F.2d at 932.

John assails as "illogical" the "City's claim that the language in question means that the villages' ordinances

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[3] *See* N.Y. Comp. Codes R. & Regs. tit. 9, pt. 444. This state regulation requires cities adopting the state building code to provide for "administration and enforcement" of the code. *Id.* at § 444.2. The regulation also sets forth specific requirements for building permits, frequency of inspections and maintenance of records. *Id.* at § 444.3. The municipalities comply with the regulation by enacting laws at the local level. *Id.* at § 444.2. Thus, although appellees purport to seek enforcement of the state regulation, Brief for Appellees at 9 n.*, they have fulfilled that responsibility by enacting and enforcing the municipal ordinances at issue. The ordinances' "municipal" character is not altered merely because they have been adopted pursuant to state regulation.

apply to Indians." He argues that the power of a state to enforce its criminal laws, even against non-Indians, on reservation land was not recognized until the Supreme Court's decision in *United States v. McBratney*, 104 U.S. 621 (1882). Thus, John contends that under the law at the time the 1875 Act was passed "New York State law had no authority over non-Indians on the Reservation, [and therefore] the municipal governments of the villages purportedly formed pursuant to New York State laws were arguably invalid and without authority to govern." Appellant concludes that the 1875 Act was passed solely to "validate the leases and confirm the formation of lawful village governments."

The argument is flawed. John ignores the Supreme Court's decision in *New York v. Dibble*, 62 U.S. (21 How.) 366 (1859), which recognized the sovereign power of New York State over the Seneca's "persons and property, so far as it was necessary to preserve the peace of the Commonwealth," and the state's authority to enforce, on the reservations, laws respecting trespass by non-Indians on Indian land. *Id.* at 370. Therefore, the Supreme Court's holding in *McBratney* was, to some extent, presaged by *Dibble*.

Additionally, appellant's construction of the 1875 Act would lead to an absurd result. John contends that Congress' sole purpose in adopting the disputed language was to proclaim the power of New York State to create villages with "lawful" governments, and that it never intended to guarantee that the laws enacted by those governments would be in force on the leased land. John's reading denies the villages a fundamental characteristic of government: the power to regulate the land within their territorial limits. Thus, appellant suggests that Congress intended to establish the villages' *authority* to govern while denying them the *ability* to do so. We cannot adopt this tortured reading of Congress' language.

Appellant also claims that the appellees' construction of section 8 "would create a topsy turvy jurisdictional scheme which Congress could not have intended." Referring to our determination in *Forness* that the laws of New York State did not extend to the leased land, John suggests that, under our interpretation of the 1875 Act, Congress provided for the enforcement of village laws, but not state laws, on the leased land. In fact, in *Forness* we held that Congress had created just such a jurisdictional scheme; the *Forness* court concluded that only the laws of New York's municipalities extended to the leaseholds, to the exclusion of state laws governing the relations of lessors and lessees. *Forness*, 125 F.2d at 932.[4]

John asserts that the language of section 8 is ambiguous because the parties disagree over its construction. While we recognize that ambiguities in federal laws dealing with the Indians should be resolved in their favor, *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), we need not resort to this canon of construction to resolve the instant dispute. The meaning of the statute is abundantly clear, especially in light of *Forness*, and it leads us to conclude, as we did in that case, that the words "municipal laws" in the 1875 Act refer to the laws of New York State's municipalities.

Conceding *arguendo* that municipal laws like the Salamanca ordinances were meant to extend to the leased land, John argues nevertheless that Congress could not have intended that such laws apply to Indians living there. According to appellant, at the time that Congress

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[4] Federal statutes now provide for the application of various state laws on Indian reservations in New York. *See* 25 U.S.C. §§ 232-33. Section 232, passed in 1948, extends the State of New York's criminal jurisdiction to "offenses committed by or against Indians on Indian reservations within the [state]." Section 233, passed two years later, grants the New York courts jurisdiction to hear civil disputes "between Indians or between one or more Indians and any other person or persons" with certain exceptions.

passed the 1875 Act, few, if any, Indians lived on the leaseholds, indicating that Congress never anticipated the result we reach today.

Even assuming the accuracy of appellant's claim as to the demographics of the leased land, we cannot agree with the conclusion he has drawn. Section 8 expressly exempts the persons and property of the Indians from taxation, 18 Stat. at 331, suggesting that Congress recognized the possibility that the laws of the villages would apply to Indians as well. We conclude that Congress anticipated a change in the demographics of the leased land, and that, with the exception of taxation, Congress authorized municipalities to enforce their laws against Indians living within the villages.

Appellant and the *amici curiae* claim that subjecting John to Salamanca's ordinances necessarily trammels the Seneca Nation's tribal sovereignty and its right to govern. While Indian tribes retain certain attributes of sovereignty, their power to govern has been circumscribed over the years. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Indian tribal sovereignty is of "a unique and limited character. It exists only at the sufferance of Congress," *id.*; *see Confederated Tribes*, 447 U.S. at 152 (tribes retain sovereignty "unless divested of it by federal law"); *cf. Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 902 (10th Cir. 1982) (tribe has inherent power to regulate use by non-Indians of reservation land as long as "Congress has not acted to delegate or deny [that] right"). While the Supreme Court has noted that a tribe does not abandon its sovereignty over land simply by leasing it to non-Indians, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982), the precise scope of tribal power over leased land nonetheless is subject to limitation by Congress, *id.* at 149.

We conclude that Congress limited the sovereignty of the Seneca Nation over the reservation land within the

City of Salamanca. The plain language of the 1875 Act supports this conclusion. In section 8 of the Act, Congress provided that state laws governing the construction and maintenance of bridges and highways could be enforced within the reservation, but only with the consent of the Seneca Nation in council. *See* 18 Stat. at 331. No consent was required for the enforcement of those laws within the villages. *See id.* Similarly, enforcement of municipal laws within the villages was not predicated on the consent of the Seneca Nation. *See id.* Therefore, we believe that in section 8 Congress clearly defined the limits of the Seneca Nation's sovereign authority over the leased land. The 1875 Act distinguishes between the villages and the remainder of the reservation, and indicates that the Seneca Nation retained authority over the latter, but not the former.

We find John's argument based on the 1794 Treaty inapposite. The 1875 Act did not disturb the Seneca Nation's rights to free use and enjoyment of the leased land. Congress merely ratified leases executed by members of the tribe. These leases were voluntary conveyances of rights to present use and possession. Therefore, by their own actions the Indians diminished their enjoyment of the leased land. Under the leases, future rights of occupancy, granted in the 1794 Treaty, remain secure, subject only to the expiration of the lease terms. However, in the interim, the Indians cannot treat the leaseholds as they would other portions of the reservation. Their "free use" necessarily is limited by the rights of those in possession.

The fact that John, a member of the tribe, now possesses rights in the leased land as an individual does not change the result. The treaty defines an estate, of sorts, in land. It does not purport to cloak individual tribal members with immunity from governmental regulation. Therefore, having recognized that the Seneca Nation's present rights in the leased land are diminished, we do

not find it inconsistent with the 1794 Treaty to recognize the application of municipal law to a portion of that land regardless of the identity of its possessor.

In sum, we find that the 1875 Act extends municipal laws to the leased reservation land within Salamanca's territorial limits. Because the Salamanca ordinances are municipal laws, the 1875 Act, not 25 U.S.C. § 233, is the source of Salamanca's authority to enforce them. Therefore, we need not reach the issue whether section 233 expanded the state's regulatory jurisdiction over the Seneca Nation.[5] Thus, we do not adopt Judge Curtin's reasoning, but nevertheless agree with the result he reached.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

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[5] Nor do we consider the Secretary of the Interior's regulation, 25 CFR § 1.4, controlling in this case. We are unaware of any authority delegated to the Secretary, and John has cited none, which would empower him effectively to repeal congressional legislation. The 1875 Act must take precedence over the regulation in the absence of a clear expression of congressional intent to the contrary.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-86-621C

MAURICE JOHN, a Native American and member of the Seneca Nation of Indians,
Plaintiff,

—vs—

CITY OF SALAMANCA and NORRIS STONE,
Defendants.

APEARANCES:

WILLIAMS, STEVENS, MCCARVILLE & FRIZZELL (TIMOTHY M. O'MARA, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

SHANE & FRANZ (DAVID M. FRANZ, ESQ., City Attorney, of Counsel), Olean, New York,

—and—

RAICHLE, BANNING, WEISS & STEPHENS (R. WILLIAM STEPHENS, ESQ., of Counsel), Buffalo, New York, for Defendants.

Plaintiff in this case now brings a motion for an order to show cause why the court should not enter an order 1) granting him monetary relief and 2) preventing defendants from attempting to impose the City of Salamanca Municipal Codes and/or any other similar codes or regulations on any structures owned by him or any other Seneca Nation of Indians member within the boundaries of the Seneca Nation of Indians (Items 1, 2, 7, and 17). Defendants oppose (Items 4, 5, 8, and 9) and move for

summary judgment on their own behalf (Items 10-12). Plaintiff opposes (Items 15 and 16).

The facts of this case are quite straightforward and can be summarized as follows. Plaintiff is a Native American and a member and resident of the Seneca Nation of Indians Reservation, with a post office address of P.O. Box 208 in Steamburg, New York. It is uncontested that the City of Salamanca is partly within the Seneca Nation of Indians geographical territory and that plaintiff's property in the City is located on reservation land.

Plaintiff alleges in his complaint that defendant Norris Stone, as Zoning Officer for the City of Salamanca, is presently attempting to order him to remedy an alleged violation of Salamanca Municipal Code on certain property owned by him and commonly known as 18-20 Broad Street, Salamanca, New York.

Plaintiff alleges that defendants cannot legally impose its zoning rules on plaintiff or require him to obtain a building permit for renovations as they have attempted to do (Item 1, Exhs. A and B). Plaintiff says that the Municipal Code of the City of Salamanca and the other zoning rules and regulations are not enforceable on the Seneca Nation of Indians' lands and against a Native American and a member of the Seneca Nation of Indians. *Id.* at Exh. C [Pickering Treaty of 1794]. Defendants disagree.

In response to plaintiff's original motion papers, defendants make three arguments (Item 4). First, defendants say that, in 1957, the City of Salamanca adopted the State Building Code, N.Y. Executive Law, §§ 370-87 (repealed by L. 1981, c.707 § 12, effective January 1, 1984). *See especially*, Executive Law § 374-a (and the list attached thereto) and Executive Law § 383 (wherein the municipalities were given authority to enforce the State Building Code). Defendant says that, in enacting

Chapter 26 of the City of Salamanca Municipal Code (Item 2, Exh. C), the City accepted the authority to enforce the current building code.

Defendants argue that 28 U.S.C. § 2283 is applicable here and prohibits a federal court from issuing an injunction to prevent or stay the procedures in a state court except 1) where expressly authorized by an Act of Congress; 2) where necessary to aid in its jurisdiction; or 3) to protect or effectuate its judgments. Defendants say that the "Stop Order" issued by the City of Salamanca through its enforcement officer, Norris Stone (Item 1, Exh. B) comes within the definition of "proceedings in a State Court." *Garrett v. Hoffman*, 441 F. Supp. 1151 (E.D. Pa. 1977); *City Investing Co. v. Simcox*, 476 F. Supp. 112 (1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980). Absent intervention by the United States or a duly recognized tribe, defendants say that this court should find that section 2283 bars an injunction against defendants in this case. *See, e.g., Cayuga Indian Nation of New York v. Fox*, 544 F. Supp. 542 (N.D.N.Y. 1982).

Second, defendants argue that, because the absence of the State of New York from this action might result in an impairment of that State's interest, this court should allow a reasonable amount of time so that the State can be added as a party.

Finally, defendants argue that, as was acknowledged in the Supreme Court Case of *Williams v. Lee*, 358 U.S. 217 (1959), where Congress has wished the States to exercise power over Indians on their reservations, it has expressly granted them jurisdiction. *See People v. Cook*, 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Co. Ct. 1975); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942); *People ex rel. Ray v. Martin*, 294 N.Y. (1945), *aff'd*, 326 U.S. 496 (1946). Defendants

say 25 U.S.C. §§ 232-33 evidence this grant of power here.[1]

In response to defendants' arguments, plaintiff reiterates his view that the Seneca Nation of Indians owns and controls the land improvements within its territorial boundaries and is not subject to the City of Salamanca's zoning and building rules (Item 7). *Pueblo v. Martinez*, 436 U.S.C. 49, 58 (1978); *Patterson v. Counsel of the Seneca Nation*, 245 N.Y. 433, 437 (1927); *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 51, 56 (W.D.N.Y. 1972).

Plaintiff says that the Seneca Nation of Indians is not just a sovereign Indian nation under the protection of the United States as *trust lands* but rather *actually owns* the land which is the subject matter of this litigation.[2]

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[1] In addition to their memorandum (Item 4), defendants filed the Reply Affidavit of Ronald L. Yehl, who is presently Executive Director of the Salamanca Housing Authority and a former Mayor of the City of Salamanca (Item 5). In this document, Mr. Yehl indicates that, during his years of involvement with the City of Salamanca, the City "has never fostered or tolerated a policy of law enforcement toward Indians that was in any wise [sic] different from that applied to non-Indians," and that the City "has not experienced any difficulties or animosities from the described relationship." *Id.* at ¶¶ 5-6.

Attached to Mr. Yehl's affidavit are also attached the affidavits of John F. Gould, the present mayor of the City of Salamanca, as well as defendant Norris R. Stone. Mr. Gould's affidavit makes essentially the same points as does the Yehl affidavit. In defendant Stone's affidavit, he argues that for approximately 16 years, he "has enforced the codes under his authority as enforcement officer against Indians and non-Indians with the same even hand." *Id.* at ¶ 8. He also states that the Seneca Nation itself has consistently applied for, paid for, and obtained building permits with his office, as do individual Indians residing in the City of Salamanca. *Id.* at ¶ 9. Finally, Mr. Stone swears that he has "absolutely no political, spiteful or ulterior motive for conducting code enforcement procedures against Maurice John." *Id.* at ¶ 14.

[2] Defendants disagree. They say that the right of the Seneca Nation of Indians to the land involved here is one of occupancy only, with the fee remaining in the sovereign. Item 8, pp. 1-2.

See Pickering Treaty of 1794. *See also Worcester v. Georgia*, 31 U.S. 515 (1832). Plaintiff says it is well established that a state may not impose its civil laws in Indian country, tax reservation Indians, *Bryan v. Itasca County*, 426 U.S. 373 (1976), nor zone Indian land. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

Plaintiff also argues that, contrary to defendants' view, 28 U.S.C. §§ 2283 is inapplicable in cases like the present one, because where federal Indian Rights are affected, the federal courts clearly have jurisdiction. Plaintiff says that there is no "state court proceeding" involved below which should properly prevent this court from taking action. *Cf., United States v. State of Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981).

Finally, plaintiff says that he is a member of the Seneca Nation of Indians and, as such, has the privileges and immunities of such membership.

In their reply papers, defendants argue that Congress has the right to abrogate inconsistent treaty rights by congressional action. Therefore, it argues that 25 U.S.C. § 232-33, and not the Pickering Treaty of 1794, is dispositive here. *See also* Comment, *The New York Indians' Right to Self Determination*, 22 Buff. L. Rev. 985-1019 (1973). *See* Items 8-9.

Based on its reading of 25 U.S.C. § 233, defendants move for summary judgment on their own behalf (Item 10). Defendants say that the City of Salamanca is charged by general law of the State of New York with the enforcement of a general law of the State of New York entitled "New York State Uniform Fire Prevention and Building Code Act," Article 18-A Executive Law, § 370, *et seq.* It argues that 25 U.S.C. § 233 gives it the authority to enforce these laws against plaintiff, a member of the Seneca Nation of Indians and a resident of

the Allegany Reservation of the Seneca Nation of Indians. Defendants also argue that, contrary to plaintiff's position, plaintiff does not qualify for the exempting provisos of 25 U.S.C. § 233. They say no tribal law or custom stands in the way of a state law requirement to obtain a building permit. Finally, defendants say that no individual Indian acquires the immunity of the tribe or nation of which he is a member. *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977); *Seneca Constitutional Rights Organization v. George*, *supra* at 48. *See also* Items 11 and 12.

Plaintiff opposes defendants' summary judgment motion. In its papers, plaintiff reiterates many of the arguments set out above. Items 15-17.

Based on all of the above, plaintiff's motion for injunctive relief and monetary damages must be denied, and defendants' motion for summary judgment must be granted in all respects.

As defendants acknowledge in their papers (*see especially* Items 4 and 8), in 1875, Congress enacted 18 Stat. 330, Chap. 90, which said, in pertinent part, that "all municipal laws and regulations of said State may extend over and be in . . . villages (including the Villages of Salamanca and West Salamanca). These two named villages became the City of Salamanca in 1913.

Thereafter, in a case brought by the United States on behalf of the Seneca Indians to cancel federally-authorized leases of reservation land for non-payment of rent, the United States Court of Appeals for the Second Circuit said that "state law does not apply to the Indians except so far as the United States has given its consent." *United States v. Forness*, *supra* at 932.

In response to this language, the State of New York established the Joint Legislative Committee on Indian Affairs [Joint Committee], whose principal task was to resolve the issue of state jurisdiction over Indian affairs.

In 1945, the Joint Committee drafted two bills which eventually provided the basis for the federal legislation which, with certain exemptions inapplicable here, give the State of New York general jurisdiction over Indian reservations. 25 U.S.C. §§ 232-33. *Cf., People ex rel. Ray v. Martin, supra.*

Given the language of 25 U.S.C. § 233 and the subsequent passage of New York Executive Law, § 370, *et seq.* (*repealed by* L. 1981 c. 707 §12), it is clear that the City of Salamanca has the power and authority to enforce the provisions of the New York State Uniform Fire Prevention and Building Code Act against plaintiff. *See* Executive Law, § 374-a.

Plaintiff's motion is denied. Defendants' motion for summary judgment is granted in all respects. Plaintiff's complaint is dismissed.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: April 16, 1987

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case Number: CIV-86-621C

MAURICE JOHN, a Native American and member of the Seneca Nation of Indians

v.

CITY OF SALAMANCA and NORRIS STONE

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is granted in all respects. Plaintiff's complaint is dismissed.

/s/ Edward P. Gueth, Jr.
EDWARD P. GUETH, JR.
Clerk

Date April 16, 1987

Act of Feb. 19, 1875, 18 Stat. 330

CHAP. 90.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations, and to confirm existing leases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretoforce made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws and form of government, lease lands within said reservations for railroad-purposes.

SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, locate, and establish proper boundaries and limits of the villages of Vandelia, Carrolton, Great Valley, Salamanca, West Salamanca, and Red House, within said Allegany reservation, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may be reasonably required for the purposes of such villages; and they shall cause a return of their doings in writing, together with maps of such surveys and locations duly certified by them, to be filed in the office of the county clerk of the county of Cattaraugus, in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located and established shall be the limits of said villages for all the purposes of this act.

SEC. 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and

binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however,* That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.

SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the

laws or customs of said nation, no individual Indian or Indians, or other person claiming under him or them, has or is entitled to the rightful possession.

SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such villages now leased, as hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of lands within said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State: *Provided, however,* That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful

detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

Approved, February 19, 1875.

Act of Sept. 30, 1890, 26 Stat. 558

CHAP. 1132.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the leases of land situate within the limits of the villages mentioned in the act of Congress entitled 'An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases," approved February nineteenth, eighteen hundred and seventy-five, except leases to railroads, shall by the terms of said act be renewable, the same shall be renewable for a term not exceeding ninety-nine years, instead of the term of twelve years, as therein provided, subject to all other terms and conditions of said act.

Approved, September 30, 1890.

Act of Aug. 14, 1950, 64 Stat. 442

[CHAPTER 707]

AN ACT

To regulate the collection and disbursement of moneys realized from leases made by the Seneca Nation of Indians of New York, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys of the Seneca Nation of Indians of New York realized from existing leases, or leases that may hereafter be made, of lands within the Cattaraugus, Allegany, and Oil Springs Reservations shall be paid to and recoverable by the treasurer of the Seneca Nation of Indians for and in the name of the Seneca Nation of Indians: *Provided*, That the city of Salamanca may, if authorized by the laws of the State of New York, pay to the treasurer of the Seneca Nation all moneys payable on leases within the city of Salamanca on behalf of the owners of such leases: *Provided further*, That nothing herein contained shall be construed to authorize the city of Salamanca to grant new leases, or to modify, change, or alter existing leases, except with the consent of the Seneca Nation and upon terms agreeable to the Seneca Nation, such consent and such agreement to be obtained from such officer or agency of the Seneca Nation as may be duly authorized by the Seneca Nation to give such consent or arrive at such agreement.

SEC. 2. Nothing in this Act shall be construed as waiving the rights or title of the Seneca Nation to the lands referred to in the first section of this Act, nor shall such rights or title be abridged except as may be hereafter provided by the United States in full consideration of the rights of the Seneca Nation.

SEC. 3. From the money so received, the treasurer of the Seneca Nation shall, annually on the first Monday in June, deduct and set aside a sum not to exceed $5,000

for disposal by the council of the Seneca Nation, and distribute the balance among the enrolled members of the Seneca Nation on a per capita basis. The council of the Seneca Nation shall keep complete and detailed record of all payments and disbursements from the sum so set aside, and shall make such records available for inspection by members of the Seneca Nation at all reasonable times.

SEC. 4. The treasurer of the Seneca Nation shall give bond to the Seneca Nation, conditioned upon his faithful performance of the duties herein imposed, in such sum as may be approved by the Comptroller of the State of New York, and the treasurer of the Seneca Nation shall, annually on the first Monday in July, make a report to the Comptroller showing the receipts and disbursements of all moneys received by him under authority of this Act, and shall transmit a copy of this report to the council of the Seneca Nation and shall make a copy available for inspection by members of the Seneca Nation at all reasonable times.

SEC. 5. In addition to the authority now conferred by law on the Seneca Nation of Indians to lease lands within the Cattarugus, Allegany, and Oil Springs Reservations to railroads and to lease lands within the limits of the villages established under authority of the Act of February 19, 1875 (18 Stat. 330), the Seneca Nation of Indians, through its council, is authorized to lease lands within the Cattaraugus, Allegany, and Oil Springs Reservations, outside the limits of such villages, for such purposes and such periods as may be permitted by the laws of the State of New York.

SEC. 6. The Secretary of the Interior is directed to give to the State of New York or to any authorized agency thereof or to the proper officials of the several tribes copies of official records required by the State, or by any authorized agency thereof or by the officials of the several tribes, to carry out the purposes of this Act

or other purposes which, in the discretion of the Secretary of the Interior, are in the interests of the welfare of the Indians of New York State: *Provided*, That copies as are given to the State of New York or to any authorized agency thereof shall be available for inspection at all reasonable times by duly authorized representatives of such tribes or of the Six Nations of New York.

SEC. 7. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Approved August 14, 1950.

25 U.S.C. § 232

§ 232. Jurisdiction of New York State over offenses committed on reservation within State

The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof,[1] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(July 2, 1948, ch. 809, 62 Stat. 1224.)

25 U.S.C. § 233

§ 233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction

in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indians lands or claims with respect

thereto which relate to transactions or events transpiring prior to September 13, 1952.

(Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845.)

28 U.S.C. § 1360, Pub. L. 280, 67 Stat. 589 (1953)

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian

or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(Added Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589, and amended Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub. L. 85-615, § 2, 72 Stat. 545.)

(2)

No. 88-84

IN THE

Supreme Court of the United States

October Term, 1988

MAURICE JOHN,

Petitioner,

vs.

CITY OF SALAMANCA and NORRIS STONE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MISCELLANEOUS.

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-84

MAURICE JOHN,

Petitioner,

vs.

CITY OF SALAMANCA and NORRIS STONE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The decision of the Court of Appeals is reported at 845 F 2d 37 (Second Cir. 1988). The opinion of the District Court is unreported and is set forth in the appendix to the Petition for Certiorari at pages 13a through 19a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1988 and the Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 USC §1254 (1).

Statutory Provisions Involved in this Case

The statutory provisions involved in this case are: (1) Act of February 19, 1875, 18 Stat. 330; (2) 25 USC §233 (64) Stat. 845. They are reprinted in the appendix of the Petition of Certiorari at 21a through 24a and 27a through 29a respectively.

Counter Statement of the Case

The petitioner is a Native American and a member of the Seneca Nation of Indians who owns property located within the boundary* of the respondent city on the Indian Reservation. He wished to remodel an existing restaurant business there and began to renovate the property, both inside and outside, but did not obtain a city permit for the renovation project. Other individual Indians in the past had obtained such permits and indeed the Seneca Nation itself had, on occasion, paid the $5.00 fee and obtained a permit for the building of structures on reservation land located within the city. When the respondent Norris Stone, the accessor and zoning code enforcement officer of the city responsible for the enforcement of building codes caused a notice of building code violation to be served upon the petitioner for failure to obtain a building permit, petitioner filed a complaint and obtained an Order of the United States District Court for the Western District of New York requiring the respondents to show cause why an Order restraining the enforcement of the building code and the notice of violation should not be made. The defendants' moved for summary judgment supported by affidavits of Norris Stone and present and former executive officers of the city and members of the City Council. The District Court, relying on an act of Congress of 1950 (25 USC §233) held that the State civil law applied to reservation land in the City and dismissed the suit. The Second Circuit affirmed on different grounds and relied instead on an earlier Act of Congress passed in 1875. The Circuit Court

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* The suggestion that the city of Salamanca is growing like Topsy, which is made in footnote 12 at page 16 of the Petition, is an error. The City of Salamanca has the same boundaries as originally set forth in the surveys of the Villages of Salamanca and West Salamanca under the 1875 statute. The boundaries of the city are not changing or expanding.

held that the laws sought to be enforced were municipal laws of the City of Salamanca and that when Congress specifically provided that "all municipal laws and regulations of said State may extend over and be in force within said villages" (845 F. 2d at 40) it meant that the City of Salamanca building code provisions are applicable to land in Salamanca leased to Indians. The Second Circuit held that the 1875 Act as interpreted by the Court in *United States v. Forness*, 125 F 2d 928 (1942) decided some 46 years before made the building code adopted and enforced by the City of Salamanca applicable to the petitioner (845 F 2d at 40). This Court denied certiorari in the *Forness* case under the name of *City of Salamanca v. United States*, 316 U.S. 694 (1942).

The petitioner now seeks review in this Court.

REASONS FOR DENYING THE WRIT

(a) The decision of the Circuit Court is in accord with the decided cases and correct in all respects. It contains nothing which contradicts settled law.

This Court should deny the Petition for Certiorari. The opinion of the Second Circuit affirming the judgment below contains nothing which departs from settled law. The Court relied on its opinion in *United States v. Forness*, 125 F2d 928 (2nd Cir., 1942). That case also held that in enacting the 1875 legislation, Congress provided that municipal laws are in effect on the reservation within the City of Salamanca. This 1942 holding of the Second Circuit was through a most distinguished panel, including Circuit Judges Augustus Hand, Charles Clark and Jerome Frank. The *Forness* case has been cited with approval by this Court on numerous occasions, and this Court denied certiorari in that case (316 US 694 (1942)).

Moreover, the case was correctly decided below. Both in *Forness* and in this case, it was held that the words "all municipal laws and regulations" to "be in force within said villages" makes Salamanca municipal law applicable to all inhabitants, both Indian and non-Indian.

The affidavits presented on the motion established that the Indians, with the exception of petitioner, have complied with the municipal building code, and have paid the nominal fee of $5.00 to obtain the required building permit. The law has been settled for over 45 years that this is so, and nothing in the Second Circuit opinion should come as any surprise.

The petitioner claims that he is confused. He should not be. A careful reading of the Second Circuit opinion reveals that the Court did not affirm the judgment relying on 25 USC §233, but relied instead on the 1875

statute. When the Court stated, "We do not adopt Judge Curtin's reasoning, but nevertheless, agree with the result he reached", the Court dispels confusion. The opinion of the District Court relying on §233 is without effect under the current Court's holding. The claim made by the petitioner that "thorough confusion" results, and that "The District Court's ruling thus remains in full force" (Petition, page 13) is pure hyperbole, and not worthy of serious consideration. The sky is not falling—business goes on as usual in the City of Salamanca, with the Indians conforming to the municipal law. All that is changed is that Maurice John must pay the $5.00 fee for a building permit just like everyone else. This is as it should be, and is in accord with common sense.

A building code and a zoning law that is not applicable to all in the city is self defeating.

The case was correctly decided; it raises no earth-shattering issue; the law remains as it was for the past 118 years; the precedent established 46 years ago has been followed, and all citizens within the City of Salamanca have been treated equally.

(b) The enactment of 25 USC §233 did not supersede the 1875 Act.

The petitioner makes the novel and new* argument that the 1950 enactment of 25 USC §233 superseded the 1875 legislation. He cites in support of this remarkable thesis the case of *Montana v. Blackfeet Tribe,* 471 US 759 (1985), a tax case recently decided by this Court. There, this court reaffirmed its traditional view that attempts to tax Indian Land by the State are extraordinary and will be allowed only if the Congressional authorization is "unmistakably clear" (471 US at 465). The 1875 and 1950 actions by Congress both prohibit taxing of Indian Land and there is no claim here that the five dollar fee required for the building permit is a tax.

The fact that both statutes contain provisos that, regardless of the application of local law, no law permitting taxing of Indians shall have any effect implies that some local law applies to Indians. As stated by the Second Circuit "Section 8 expressly exempts the persons and property of the Indians from taxation, 18 Stat. at 331, suggesting that Congress recognized the possibility that the laws of the villages would apply to Indians as well" (845 F 2d at 42).

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* Not made in either the District Court or the Circuit Court.

(c) The decision reflects the custom and practice which has existed in the City of Salamanca for 113 years of the Indians complying with local law.

The Seneca Nation of Indians has complied with the local law including municipal and State law for two centuries and the decision which is sought to be reviewed only confirms that fact. Originally the leases were thought to be authorized by state law until this Court decided otherwise, *The New York Indians*, 5 Wall 761 (1867). Because the leases needed federal approval the 1875 Act was passed which required that the boundaries of the villages of Salamanca and West Salamanca be surveyed and that municipal laws be in force within said villages (Section 8).

The affidavits submitted in support of the respondents summary judgment motion in the District Court detail that the indians and indeed the Seneca Nation subject themselves to local civil law in the City of Salamanca. The Seneca Nation as well as individual Indians have applied for and received the building permit which is the subject of the current contretemps with the petitioner. Indians within the city obey the local traffic and parking laws. Local licensing laws including those regarding licensed plumbers are complied with by Indian plumbers. City civil law except laws regarding hunting and fishing permits are applied equally to Indians and non-indians in the city. Indians living in the city who own dogs obtain dog licenses and when desiring to marry, obtain the required marriage license.

The fact of the application of the laws of the State of New York and of the City of Salamanca, New York to Indians within the City of Salamanca and to Indians on the reservations located in the State of New York can be told from the point of view of what has actually occurred

since 1789. The historic development of the application of the laws of the State of New York to Indians located upon Indian reservations can be tracked through the years as follows:

A) "By chapter 183 of 1900 provision was made for compulsory education of Indian children on the Allegany and Cattaraugus reservations, and by chapter 188 of 1901 like provision was made for the Onondaga reservation. By chapter 424 of 1904 provision was made for the compulsory education of Indian children on all reservations within the State. It seems to have been carried into effect without any notable opposition, and its benefits are mentioned in the report of a committee that investigated conditions upon the reservations in 1905 (Assembly Document No. 40 of 1906, pages 296-297)." (Opinions of the Attorney General, 1925 at page 212.)

B) "By the Treaty of Fort Harmar, in 1789, confirming peace between the United States and the Six Nations (VII Stat. 33, II Kappler 23, Indian Problem 87) it was provided that Indians guilty of robbery, murder or horse stealing, committed against citizens or subjects of the United States, should be delivered up to the nearest military post if the crime was committed within the territory of the United States, or to the civil authority of the State within which it should have happened." (Opinions of the Attorney General, 1928 at page 121.)

C) "... In extending our system of laws over these people (Indians) for their own protection, as well as for the protection of the people and citizens generally, no attempt has ever been made to interfere with their social or domestic relations, nor to regulate the manner of acquiring, holding or conveying property among themselves. But in their intercourse and dealings with

other people, they, as individuals, are subject to the civil and criminal laws of the State, . . ." *Crouse vs. N.Y. Penn. and Ohio R.R. Co.,* reported in 49 Hun, 576, cited by the Attorney General in rendering an opinion in favor of the right of levy on an Indian reservation. (Opinions of the Attorney General, 1932 at page 383.)

D) "In the absence of Federal regulation the State, through its Conservation Department, has the authority to enforce its police regulations with regard to fire control as embodied in sections 50, 51 and 63 of the Conservation Law, as well as the department forest fire regulation, No. 2, effective February 5, 1925." (Opinions of the Attorney General, 1934 at page 285.)

E) "The police power of the State extends to Indians living on reservations in this State and the State courts have criminal jurisdiction except with respect to the crimes enumerated in 18 USC §548." (Opinions of the Attorney General, 1937 at page 113.)

F) "The State, in the exercise of its police power, has the authority to enforce compliance with the provisions of the State Vehicle and Traffic Law with regard to operators' licenses and motor vehicle registration and the provisions of the State Tax Law relating to licenses for filling station operators and payment of motor fuel tax, against tribal Indians residing upon the Indian reservations of the State. The provisions with reference to the licensing and registration of motor vehicles is not applicable to their use upon the reservations off the public highways." (Opinions of the Attorney General, 1939 at page 189.)

G) "State peace officers have as complete authority to enforce the provisions of the State Vehicle and Traffic Law between Indians and between Indians and white

persons on tribal reservations as they have elsewhere in the state after excluding, however, the criminal offenses comprehended in the federal statute, commonly known as the Seven Crimes Act (Title 18, Sec. 548 (Crim. Code Sec.) USCA.)" (Opinions of the Attorney General, 1942 at page 211.)

H) "County commissioner of health who has succeeded to duties of town health officers takes their duties upon the reservations for the enforcement of the general provisions of the State Sanitary Code." (Opinions of the Attorney General, 1943 at page 287.)

I) "State Troopers have power and duty to maintain law and order upon the reservations, and particularly upon the Tonawanda Reservation." (Opinions of the Attorney General, 1944 at page 325.)

J) "The dog licensing law is applicable to the Tuscarora reservation and the Lake Ontario Ordinance Works, but is not applicable to Fort Niagara." (Opinions of the Attorney General, 1945 at page 103.)

The State's regulation of Indians on Indian Reservation evolved because of expediency and this condition of necessity was recognized by the United States Supreme Court in *People vs. Dibble,* 21 How. 366 at 370 (1859) when it was said:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the state of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

The laws and regulations relating to vehicle and traffic, housing, zoning, building permits, etc. have always been enforced by the City and State as against Indians and non-indians alike.

The authority to so regulate the conduct of Indians within the City as well as on the Indian reservation has been derived from statutes such as New York Indian Law §71, the Act of 1875, 25 USC §232 and §233 as well as from the more subtle authority of expediency which has been countenanced by the United States Supreme Court on the predicate of "Judicial recognitions of the State's jurisdiction to legislate and adjudicate for all persons within its borders, including law and order on the reservations, except where Congress has provided. . . ." (See Opinions of the Attorney General, 1950 at page 207.) Because Congress has not acted, it does not follow that there is no law upon a reservation, *Mulkins vs. Snow,* 232 N.Y. 47 (1921).

The conclusions to be drawn from what has occurred is that the State, in the exercise of its own sovereignty and police power, can enforce its provisions against Indians except in the instances (prior to 25 USC §233) where it would invade treaty rights, interfere with Indian commerce, or interfere with the National right of protectorate.

The custom and practice in the City of Salamanca is to comply with the provision of the 1875 Act. This court should not sow doubt as to the correctness of these practices by granting certiorari.

Conclusion

The Petition for a Writ of Certiorari should be denied.*

Respectfully submitted,

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* As an alternative we believe that the District Court was correct in interpreting the legislative history of 25 USC §233 as evidencing the intent of Congress that the Indians are fully subject to State civil law. The legislative history of the act states "This bill provides that the Indians in the State of New York shall be subject to the civil laws of the State with the following exceptions: "(1950 United States Code Congressional and Administrative News pg. 3731; See also footnote 6 of this Court's opinion in *Williams v. Lee*, 358 US 217 at 221 (1959) using 25 USC §233 as an example of a Congressional grant of broad civil jurisdiction to the State). If that is so this Court should grant the petition and affirm the judgment in the District Court based on the opinion of the District Court.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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1. We think Respondents have actually reinforced the reasons why this Court should take this case. At page 6 Respondents state that the District Court's decision was not adopted by the Second Circuit and so, they claim, our assertion that the District Court's ruling—that 25 U.S.C. § 233 establishes state civil regulatory jurisdiction over Indians—remains in force, is "hyperbole." Opp. at 6. Yet at page 12 Respondents state New York has full jurisdiction over Indians in New York, citing as authority none other than 25 U.S.C. § 233! Opp. at 12. The footnote at page 13 reiterates the importance of § 233 by

arguing that the District Court's construction of § 233 be affirmed by this Court.

Petitioner's fears are far from "hyperbole." In its brief, the City has clearly asserted its civil regulatory authority as emanating from § 233. This assertion of authority is clearly wrong and is at odds with this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976). *See* Petitioner's Brief at 20-26.

Respondents' reliance on the *Forness* case also leads this Court head on into the § 233 issue. The *Forness* decision, which held the state had no jurisdiction over Indians under the 1875 Act, *was the very reason for the passage of § 233! See United States v. Forness*, 125 F.2d 928 (2d Cir. 1942). This is the very reason we say § 233 superceded the 1875 Act. Pet. at 18-20.

2. Respondents' position, if accepted, means that the Seneca Nation and the Allegany Reservation are to be treated differently than every other tribe and reservation in the country. Unlike even those tribes expressly subject to state jurisdiction under Public Law 280, it is only the Seneca Nation (and other New York tribes) that are being subject to full state regulatory authority under the guise of § 233. It is only the Allegany Reservation that has been singled out as being without any authority over Indians and Indian land within a city located on a reservation.[1]

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[1] The following is a partial list of non-Indian towns located partly or wholly within reservations:

Arizona: Parker (pop. 2542), Colorado River Res.; *California*: Palm Springs (pop. 32,271), Rancho Mirage (pop. 6281), Cathedral City (pop. 3640), all on Agua Caliente Res. *Idaho*: St. Maries (pop. 2794), Couer D'Alene Res.; Lapwai (pop. 1034), Nez Perce Res. *Michigan*: Mount Pleasant (pop. 23,746), Saginaw Res. *Minnesota*: Prior Lake (pop. 7284), Shakopee Mdewakanton Res. *Montana*: Browning (pop. 1226), Blackfeet Res.; Wolf Point (pop. 3074), Fort Peck Res. *North Dakota*: New Town (pop. 1335), Parshall (pop. 1059) both on Fort Berthold Res. *South Dakota*:

A myriad of cases have recognized that the mere establishment of a non-Indian town on a reservation does not displace tribal authority over Indians and does not grant the town jurisdiction over Indians living within the community. *See, e.g., Buster v. Wright,* 135 F. 947, 952 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), *cited with approval in Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982); *Shakopee Mdewakanton Sioux v. City of Prior Lake,* 771 F.2d 1153 (8th Cir. 1985); *Chase v. McMasters,* 573 F.2d 1011 (8th Cir. 1978); *Segundo v. City of Rancho Mirage,* 813 F. 2d 1387, 1391 (9th Cir. 1987).

If for no other reason than to correct this inequitable situation that abrogates the Seneca Nation's tribal sovereignty, the petition for certiorari should be granted.

3. Another contention of Respondents (Opp. 8-12) is that because the City and State have historically exercised jurisdiction over Indians without challenge, this is evidence that such exercise of jurisdiction is correct. Respondents call this the "subtle authority of expediency." Opp. at 12.[2] However, "expediency" is hardly a

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Mission (pop. 748), Rosebud Sioux Res. *Washington*: Omak (pop. 4007), Coulee Dam (pop. 1412), Colville Res.; Tacoma (pop. 158,501), Puyallup Res.; Toppenish (pop. 6517), Wapato (pop. 3307), Grandview (pop. 5615) all on Yakima Res. Of the States named, California, Idaho, Minnesota and Washington have significant Public Law 280 jurisdiction on Indian reservations.

[2] Respondents rely on Opinions of the Attorney General (we assume the State's Attorney General) concerning the exercise of state jurisdiction. These opinions were all written prior to the enactment of 25 U.S.C. § 233 in 1950 where Congress specifically defined the extent of state jurisdiction. This statute did change prior practices in the exercise of jurisdiction in New York. *See* Cohen, Handbook of Federal Indian Law 372-373 (1982 ed.). And § 233 has never been construed by this Court to determine the extent of that jurisdiction.

Likewise, Respondents rely on *People v. Dibble,* 62 U.S. (21 How.) 149 (1859) as justification for the State's exercise of jurisdiction

legitimate basis for the assumption of state jurisdiction over Indians—the rule is that only clear congressional consent can serve as a basis for state jurisdiction. The argument as to historic exercise of jurisdiction was implicitly raised in *Mattz v. Arnett*, 412 U.S. 481, 484-485 (1973), but this Court was not persuaded that past practices without more could justify the exercise of state jurisdiction.

Indeed, if Respondents' argument were persuasive, this country would still be practicing school segregation.

4. Respondents' analysis of our use of *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) completely misses the mark. Opp. at 7. We do not contend the building permit is a tax. It is the analysis of successive statutes that was made in *Blackfeet* that is relevant. Our previous brief sets forth this reasoning at 18-20. We will not rehash it here.

Respondents also contend that since Congress specifically foreclosed the applicability of certain state laws to Indians, such as state tax laws, this shows an intent that all other state laws must apply. Opp. at 7. This same argument was made concerning Public Law 280, which sets forth specific exceptions to the application of state civil laws. This Court rejected that argument in *Bryan* and should do so here. *Bryan*, 426 U.S. at 378-79.

The fact of the matter is that Respondents have not refuted any of our arguments concerning the 1875 Act or § 233. Respondents have simply baldly asserted that ju-

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over New York Indians. But their interpretation of *Dibble* is incorrect since it addresses laws passed to protect Indians from intrusion by non-Indians. Regardless of what *Dibble* says, even if Respondents' reading is correct, *Dibble's* precedential value is limited by this Court's more recent rulings protective of Indians from state interference. *See, e.g., McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

risdiction does exist. This Court should not leave the issue in the clouds.

Petitioner requests that the petition for certiorari be granted.

Respectfully submitted,

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